

1995

# State of Utah v. Walter Kaatman : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellee,

v.

WALTER KAATMAN,

Defendant/Appellant.

Priority No. 2

Case No. 950155-CA

BRIEF OF APPELLEE

APPEAL FROM A CONVICTION FOR RETAIL THEFT, A  
THIRD DEGREE FELONY, IN VIOLATION OF UTAH  
CODE ANN. § 76-6-602(1)(1995), IN THE THIRD  
JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE  
COUNTY, UTAH, THE HONORABLE KENNETH RIGTRUP,  
PRESIDING.

UTAH COURT OF APPEALS

UTAH

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ORAL ARGUMENT AND PUBLISHED OPINION NOT REQUESTED

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COURT OF APPEALS

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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a conviction for retail theft, a third degree felony, in violation of Utah Code Ann. § 76-6-602(1) (1995).

This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1994).

ISSUES PRESENTED AND STANDARDS OF REVIEW

1. Is defendant's appeal from the trial court's denial of his motion to withdraw his guilty plea barred by the thirty-day jurisdictional limitation of Utah Code Ann. § 77-13-6 (1995), when defendant pled guilty on March 8, 1993, but did not file a motion to withdraw his guilty plea until August, 12, 1993?



The interpretation of a statute is a question of law, which this Court reviews without deference to the trial court. State v. James, 819 P.2d 781, 796 (Utah 1991).

2. Can defendant obtain a reversal of his conviction based on a claim of an inadequate factual basis to support his guilty plea where defendant has not provided a transcript of the plea withdrawal hearing?

Where the appellant fails to provide an adequate record on appeal, the reviewing court "must assume the regularity of the proceedings below." State v. Miller, 718 P.2d 403, 405 (Utah 1986).

3. Can this Court review defendant's challenge to the trial court's determination that he was effectively assisted by his plea counsel where defendant's claim is based solely upon an affidavit appearing nowhere in the record, and he has not provided a transcript of the plea withdrawal hearing?

The dispositional standard set forth above applies to this issue as well.

#### CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Utah Code Ann. § 77-13-6 (1995):

(1) A plea of not guilty may be withdrawn at any time prior to conviction.

(2) (a) A plea of guilty or no contest may be withdrawn only upon good cause shown and with leave of the court.

(b) A request to withdraw a plea of guilty or no contest is made by motion and shall be made within 30 days after the entry of the plea

**Utah Code Ann. § 76-6-602(1) (1995):**

A person commits the offense of retail theft when he knowingly: Takes possession of, conceals, carries away, transfers or causes to be carried away or transferred, any merchandise displayed, held, stored or offered for sale in a retail mercantile establishment with the intention of retaining such merchandise or with the intention of depriving the merchant permanently of the possession, use or benefit of such merchandise without paying the retail value of such merchandise[.]

**STATEMENT OF THE CASE**

Defendant was charged with retail theft, a third degree felony, in violation of Utah Code Ann. § 76-6-602(1) (1995) (R. 6).

Defendant pled guilty as charged on March 8, 1993 (R. 18). The trial court sentenced defendant to a zero-to-five year term in the Utah State Prison and imposed fines, fees, and restitution (R. 36). The parties later stipulated that defendant would not be required to pay restitution (R. 68).

Without specifying any grounds, defendant filed a pro se motion to withdraw his guilty plea on August 12, 1993 (R.

40).<sup>1</sup> Appointed counsel filed another motion to withdraw defendant's guilty plea under rule 11, Utah Rules of Criminal Procedure, on December 6, 1993 (R. 51).<sup>2</sup> Sanders' supporting memorandum challenged the effectiveness of defendant's counsel at the time the guilty plea was entered<sup>3</sup> and also challenged the voluntariness of the plea (R. 53-58). Sanders' filed another memorandum on March 24, 1995, which memorandum asserted only the involuntariness of defendant's guilty plea and deleted reference to the claimed ineffective assistance of Anderson (R. 63-65).

Following an evidentiary hearing on April 11, 1994, the trial court denied defendant's motion to withdraw his guilty plea (R. 67). The trial court's written Findings of Fact and Conclusions of Law were entered on March 10, 1995 (R. 83-87).<sup>4</sup>

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<sup>1</sup> Although defendant filed his pro se motion to withdraw his guilty plea under rule 65B(b)(10), Utah Rules of Civil Procedure, it was not treated as a petition for post-conviction relief. Indeed, defendant filed a separate petition for post-conviction relief in Kaatman v. State, Case No. 930904595 HC.

<sup>2</sup> David Sanders was appointed to represent defendant for purposes of his post-conviction claim (R. 49-50). Sanders' supporting memorandum purported to consolidate defendant's direct appeal with the post-conviction claim (R. 54). The two cases were not consolidated (R. 70).

<sup>3</sup> Defendant was represented by Patrick Anderson at the time he entered his guilty plea (R. 10).

<sup>4</sup> Although defendant's notice of appeal indicates he is appealing from a final order entered on February 3, 1995 (R. 81),

### STATEMENT OF THE FACTS

As defendant's conviction resulted from his plea of guilty rather than a trial on the merits, the facts are gleaned from the probable cause affidavit, and from defendant's written statement: On October 2, 1992, defendant carried six textbooks (having a combined value of \$496.50), past the cashier at the University of Utah Bookstore, without attempting to pay for them (R. 7, 21). Defendant was stopped at the bookstore exit by a bookstore employee (R. 7, 21). The employee asked defendant if he had a receipt for the textbooks and defendant said "No," but that he was going to pay for the books (R. 7). Defendant returned to the cash register, placed the textbooks on the register stand, and then left the store without paying for the textbooks (R. 7, 21).

### SUMMARY OF THE ARGUMENT

Where, as here, a review of the record demonstrates that the defendant was informed of the 30 day time limit for withdrawing his guilty plea at the time the plea was entered, that 30 day time limit becomes jurisdictional. State v. Price, 837 P.2d 578, 583-84 (Utah App. 1992). Because defendant's

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no such order appears in the record.

motion to withdraw his guilty plea was not filed within the 30 day time period, the trial court had no jurisdiction to review it. Thus, even if the issue was not raised below, this Court should deny the appeal for lack of jurisdiction.

Even assuming the Court were to find that the trial court had jurisdiction to review defendant's motion to withdraw his guilty plea, the appeal is not properly before the Court. Specifically, defendant has not supplied a transcript of the evidentiary hearing on defendant's motion to withdraw his plea for the Court's review. The Court therefore has no basis upon which to review the trial court's findings and conclusions and must instead assume the regularity of the proceeding below and affirm the trial court's ruling. State v. Wulffenstein, 657 P.2d 289, 293 (Utah 1982), cert. denied, 460 U.S. 1044 (1983); Jolivet v. Cook, 784 P.2d 1148, 1150 (Utah 1989), cert. denied, 493 U.S. 1033 (1990).

## ARGUMENT

### POINT I

DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEA CAME MORE THAN 30 DAYS AFTER THE ENTRY OF THE PLEA; THUS, THE TRIAL COURT DID NOT HAVE JURISDICTION TO REVIEW THE MERITS OF THE REQUEST AND THIS COURT SHOULD AFFIRM THE TRIAL COURT'S DENIAL OF THE MOTION ON THAT BASIS

When defendant pled guilty to retail theft on March 8, 1993, the trial court told him that he had 30 days to request to withdraw the plea (R. 99). Additionally, defendant executed a written statement wherein he indicated his understanding that if he so desired, he must move to withdraw his guilty plea within the next 30 days (R. 24). The record is thus replete with indication that defendant knew of the 30 day time limit when he first moved to withdraw his guilty plea on August 12, 1993, five months and seven days after the time for so doing had expired (R. 40).

Based on the above facts, the 30 day time limit for withdrawing a guilty plea set forth in Utah Code Ann. § 77-13-6(2)(b) is jurisdictional. State v. Price, 837 P.2d 578, 583-84 (Utah App. 1992). Consequently, the trial court did not have jurisdiction over defendant's untimely motion to withdraw his

guilty plea, despite its holding of an evidentiary hearing on the matter (R. 67). Id. This Court need not decide the merits of defendant's motion, but should deny the appeal for lack of jurisdiction. Id. at 583; Olson v. Salt Lake School District, 724 P.2d 960, 964 (Utah 1986) (acquiescence is insufficient to confer jurisdiction, which can be raised for the first time on appeal).

## POINT II

DEFENDANT'S CLAIM OF AN INADEQUATE FACTUAL BASIS TO SUPPORT HIS GUILTY PLEA IS NOT PROPERLY BEFORE THE COURT BECAUSE IT IS NOT PRESERVED IN THE EXISTING RECORD AND DEFENDANT HAS NOT PROVIDED A TRANSCRIPT OF THE PLEA WITHDRAWAL HEARING ON APPEAL; ALTERNATIVELY, THE AVAILABLE RECORD INDICATES A SUFFICIENT FACTUAL BASIS FOR DEFENDANT'S GUILTY PLEA

### **A. Inadequate Record on Appeal**

Alternatively, even if the Court were to find jurisdiction to review defendant's motion to withdraw his guilty plea, defendant fails to demonstrate that his appeal is otherwise properly before the Court. In Point I of his brief, defendant claims that the factual basis in support of his guilty plea is inadequate. Br. of App. at 5-8. However, defendant makes no claim that the issue was preserved at the time he moved to withdraw his plea below. See Utah R. App. P. 24(a)(5) (requiring

the appellant to provide "citation to the record showing that the issue was preserved in the trial court"). Indeed, the existing record suggests that defendant moved to withdraw his guilty plea on the sole ground that it was involuntarily entered (R. 63).<sup>5</sup> Defendant has not supplied a transcript of the evidentiary hearing on his plea withdrawal motion; thus, it is not possible for the Court to determine whether the issue was preserved at that time. State v. Wulffenstein, 657 P.2d 289, 293 (Utah 1982) (reviewing court has no power to determine question which depends for its existence upon alleged facts unsupported by the record), cert. denied, 460 U.S. 1044 (1983). Because the issue is not preserved in the available record, and because defendant alleges no plain error or exceptional circumstance that would excuse the waiver of his claim, the issue is improperly before the Court and should be rejected. State v. Jennings, 875 P.2d 566, 570 (Utah App. 1994).

Even if the Court were to overlook defendant's twin failures to demonstrate preservation of the issue in the record, and to supply a transcript of the evidentiary hearing on his

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<sup>5</sup> Although defendant appeared to also challenge the effective assistance of trial counsel (R. 51), that claim was deleted from a subsequently filed memorandum which focused exclusively on the alleged involuntariness of the plea (R. 63).



motion to withdraw his guilty plea, defendant's allegation of an inadequate factual basis is meritless.

**B. Adequate Factual Basis For Guilty Plea**

In pleading guilty to retail theft,<sup>6</sup> defendant executed an affidavit setting forth his understanding of the factual basis for his plea:

My conduct . . . that constitutes the elements of the crime[] charged [is] as follows: That on Oct. 1, 1992[,], I took some books beyond the cash register at the U of U Bookstore, with the purpose to deprive the Bookstore thereof.

(R. 21). Additionally, defendant agreed with defense counsel's oral recitation of his culpability:

THE COURT: What are the underlying factual bases for this claim?

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<sup>6</sup> See Utah Code Ann. § 76-6-602(1) (1995):

A person commits the offense of retail theft when he knowingly: Takes possession of, conceals, carries away, transfers or causes to be carried away or transferred, any merchandise displayed, held, stored or offered for sale in a retail mercantile establishment with the intention of retaining such merchandise or with the intention of depriving the merchant permanently of the possession, use or benefit of such merchandise without paying the retail value of such merchandise.

MR. ANDERSON: Your Honor, [defendant] was at the University Bookstore, had a stack of books, he went beyond the cash registers, was at that point approached before he left the doors of the building. He was beyond the registers. He returned to the store, sat the books down and exited the store.

THE COURT: Do you understand that by entering a guilty plea, you admit those facts?

THE DEFENDANT: Yes, sir.

THE COURT: Are those facts true?

THE DEFENDANT: Yes, sir.

THE COURT: Is it your desire to enter a guilty plea because you feel that you are, in fact, guilty?

THE DEFENDANT: Yes, sir.

(R. 95-96).

Defendant claims the above factual basis is inadequate on the grounds that he did not remove the books from the bookstore and that the books were not "secreted nor were the price tags altered or changed." Br. of App. at 8. Thus, defendant cursorily concludes he had no intention to permanently deprive. Defendant's sketchy analysis overlooks his admission to carrying the books past the bookstore cash registers toward the bookstore exit, without attempting to pay for them, before he was stopped by a bookstore employee (R. 21, 95-96). It also

overlooks his written statement admitting to having the requisite mental state, i.e., a purpose to deprive (R. 21). Such conduct is reasonably susceptible to an inference of intent to permanently deprive the bookstore for purposes of the retail theft statute. See n.6, supra. Defendant cites no contrary authority.

### POINT III

DEFENDANT'S FAILURE TO PROVIDE A TRANSCRIPT OF THE PLEA WITHDRAWAL HEARING AND HIS SOLE RELIANCE ON AN AFFIDAVIT THAT APPEARS NOWHERE IN THE RECORD PRECLUDE HIS CHALLENGE TO THE TRIAL COURT'S DETERMINATION THAT HE WAS EFFECTIVELY REPRESENTED BY HIS PLEA COUNSEL

#### **A. Inadequate Record On Appeal**

Defendant has also failed to support, with an adequate record, his challenge to the trial court's determination that he was effectively represented by his plea counsel. Br. of App. at 9. Accordingly, this Court has no power to review defendant's claim.

As noted in Point II, supra, defendant has not supplied a transcript of the evidentiary hearing on his plea withdrawal motion. See State v. Wulffenstein, 657 P.2d 289, 293 (Utah 1982) (defendant has duty to support claim of error with adequate record and "[a]bsent that record, defendant's assignment of error

stands as a unilateral allegation which the review court has no power to determine"), cert. denied, 460 U.S. 1044 (1983).

Although defendant appeared to withdraw his claim of ineffective assistance of plea counsel prior to the evidentiary hearing, see n. 5, supra, the trial court entered specific findings on the issue, concluding that defendant had in fact been effectively represented (R. 83-87). Rule 11(e)(2), Utah Rules of Appellate Procedure, requires the appellant to supply a transcript of the proceedings below if he intends to challenge any fact finding, or to argue that any conclusion is unsupported by the evidence.

"Otherwise, [the Court has] no basis on which to evaluate the findings and conclusions." King v. Industrial Commission, 850 P.2d 1281, 1285 (Utah App. 1993).

Because defendant has not provided a transcript of the evidentiary hearing wherein the issue of plea counsel's effectiveness was apparently considered, the Court is without a basis upon which to review the propriety of the trial court's findings and conclusions. Consequently, the Court must assume the regularity of the proceedings below and affirm the trial court's ruling. Jolivet v. Cook, 784 P.2d 1148, 1150 (Utah 1989).

**B. Affidavit Not Appearing in Record Cannot  
be Considered**

Finally, as sole support of his assertion of plea counsel's ineffectiveness, defendant has attached to his brief on appeal an affidavit by his post-conviction counsel. See Br. of App. at Addendum A, Exhibit C. However, the affidavit appears nowhere in the record. Because the Court cannot consider material outside the record, the affidavit is improperly before it and should be rejected on that ground. State v. Cook, 714 P.2d 296, 297 (Utah 1986); State v. Bingham, 684 P.2d 43, 46 (Utah 1984).

**CONCLUSION**

Based on the above, the Court should affirm the lower court's denial of defendant's motion to withdraw his guilty plea.

RESPECTFULLY submitted this 10<sup>th</sup> day of September,  
1995.

JAN GRAHAM  
UTAH ATTORNEY GENERAL

  
MARIAN DECKER  
Assistant Attorney General

CERTIFICATE OF MAILING

I certify that on the 10<sup>th</sup> day of September, 1995, I caused to be mailed, by U.S. Mail, postage prepaid, two (2) true and correct copies of this BRIEF OF APPELLEE to:

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